In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1046

DAVID BERNARD BARASH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was tried and convicted on multiple counts charging bribery of Internal Revenue Service employees, and was sentenced to a year and a day concurrently. His conviction was reversed, 365 F. 2d 395 (C.A. 2), and petitioner was retried and again convicted on various counts. Petitioner was then sentenced to concurrent terms of nine months imprisonment and fines totalling $11,000 on eleven counts; to concurrent terms of five years, suspended, five years probation, and fines totalling $5,000 on two other counts; and to concurrent terms of two years, suspended, and fines totalling $5,000 on the remaining two counts. That

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conviction was affirmed, 412 F. 2d 26 (C.A. 2), certiorari denied, 396 U.S. 832.

Petitioner then sought a reduction of sentence in the district court. The nine month concurrent prison terms were reduced to seven months, but the remainder of the sentence was not altered. On appeal from this ruling, the Second Circuit, on the authority of *North Carolina* v. *Pearce*, 395 U.S. 711, and *United States* v. *Coke*, 404 F. 2d 836 (C.A. 2), voided the entire sentence imposed at the second trial. The court concluded that "*Pearce* and *Coke* prohibit * * * an increase in the punishment imposed after a conviction on retrial regardless of the form of punishment, whether it is imprisonment, suspended sentence with probation, fine, * * * or any other corrective measure the court may provide," and held that the "sentencing judge is bound * * * to follow the kind, as well as to stay within the bounds of the degree of severity, of the punishment imposed following the first trial * * *." Accordingly, the court remanded the case to the district court for resentencing, with instructions "to fix sentences which are equal to or less than imprisonment for one year and one day, without the imposition of any fine, giving [petitioner] credit for the time during which he has been actually imprisoned." *United States* v. *Barash*, 428 F. 2d 328, 331–333 (C.A. 2) (Pet. App. 7a–15a, at 12a, 14a, and 15a). On remand, the district court sentenced petitioner to concurrent terms of ten months on all counts, with credit of seven months for the time actually served. Petitioner again appealed, and the court of appeals affirmed (Pet. App. 1a–6a).

Petitioner contends here, as in the court below, that the ten-month term constitutes double jeopardy because he had completed serving the seven-month imprisonment portion of his second, albeit illegal, term before imposition of the final ten-month sentence. He further argues, relying on *North Carolina* v. *Pearce*, *supra*, that the ten-month sentence denies him due process. But the second sentence was voided in its entirety by the court of appeals, which then instructed the sentencing judge to impose any sentence of the same type as, and not more severe than, the original sentence of one year and one day—and the final ten-month sentence clearly complies with this direction. And the second sentence included, in addition to imprisonment, fines and suspended and probationary sentences, none of which had been imposed in the original sentence. Thus, as the court below suggested in overturning the second sentence, that sentence in a real sense was more onerous than the original sentence—and perforce, than the final sentence. In these circumstances, the final sentence is not double jeopardy as to petitioner and does not deny him due process.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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